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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

RICHARD W. BURGE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Richard W. Burge prays that a Writ of Certiorari issue to review the judgment of the U. S. Court of Appeals for the Ninth Circuit of February 25, 1965 affirming his conviction for a violation of 21 U.S.C. § 174 and a sentence of five years imprisonment

imposed by the U. S. District Court for the District of Alaska.

OPINIONS BELOW

The opinions of the Court of Appeals on rehearing are reported at 342 F. 2d 408. They are reprinted in Appendix A, pp. 1a-12a, *infra*. The opinions of the Court of Appeals on the original hearing are reported at 333 F. 2d 210. They are reprinted in Appendix B, pp. 14a-35a, *infra*. The District Court's post-trial Memorandum Opinion is unreported. It is reprinted in Appendix C, pp. 36a-44a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on February 25, 1965. On April 17, 1965 the Court of Appeals denied an untimely petition for rehearing in an order reprinted in Appendix A, p. 13, *infra*. On May 11, 1965 petitioner made application to Mr. Justice Douglas for an extension of time to file a Petition for Certiorari. This motion was granted on May 14, 1965 and the time for filing the petition was extended to June 16, 1965 "providing the statutory time has not already expired." While we would urge, if necessary, that the petition for rehearing, though untimely, tolled the time for filing under Rule 22(2) of this Court, it is settled that this Rule is not jurisdictional. *Heflin* v. *United States,* 358 U.S. 415, 418 n.7. See also *McAbee* v. *United States,* 361 U.S. 537 and *Preston* v. *United States,* 376 U.S. 364 which were decided on their merits though the petitions for certiorari were untimely filed. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is the legality of the search of petitioner's automobile, conducted without a warrant, seven days after his arrest and at a place remote from that of the arrest, saved by the circumstance that the automobile had been impounded for forfeiture under 49 U.S.C. § 782?

2. Petitioner was a house guest at the apartment of one Miss Wright, living in a separate bedroom, but sharing a bathroom. With Miss Wright's consent, given while she was under arrest, and found to be voluntary by the trial court, police officers searched the apartment without a warrant, and seized an item in the bathroom. The ruling of the Court of Appeals affirming the admissibility of this item over petitioner's objection raises three questions:

a) Did Miss Wright's consent support the warrantless search and seizure of evidence against petitioner?

b) Does a Court of Appeals adequately review a District Court determination that the consent to a search was "voluntary" and obviates the Fourth Amendment's requirement of a warrant, when it affirms that determination on the sole ground that it was not "clearly erroneous"?

c) May a consent to a search be considered "voluntary" and obviate the requirement of a warrant where the consenting party is under arrest? If so, what factors should the courts consider in determining voluntariness of a consent given under arrest?

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, 21 U.S.C. § 174 and 49 U.S.C. § 781 and § 782. These provisions are reprinted in Appendix "D", pp. 45a-46a, *infra*.

STATEMENT OF THE CASE[1]

A. The Indictment

Petitioner Richard W. Burge was indicted on two counts charging violations of 21 U.S.C. § 174. Count one, on which the jury was unable to agree, charged that on or about the 23rd day of April 1959 at Fairbanks, Alaska he knowingly received, sold and facilitated the sale of heroin to one Hazel Geary. The second, on which petitioner was convicted, charged that on or about the same date he did knowingly conceal and facilitate the transportation of heroin.

B. The Evidence at Petitioner's Trial

As the issues on which review is sought relate exclusively to the admissibility of two pieces of evidence which were seized in separate warrantless searches, a full recitation of the evidence at petitioner's trial is not necessary. The chief prosecution witness was one Hazel Geary, of whom it would be more charitable than accurate to say that she was a gentlewoman "worthy

[1] The Record in this Court consists of formal documents in the District Court and Court of Appeals and two volumes of the Transcript of Trial Proceedings which will be cited as "Tr.".

implicit belief."[2] The Court of Appeals summarized her testimony as follows (App. A., pp. 3a-4a, *infra*):

> "That on the night of April 20, 1959, appellant approached her with a proposal to 'dump a large quantity of heroin'; that she demanded a sample before she would do business on a larger scale; that she was furnished $20 by law enforcement officers and purchased a sample of heroin from appellant on April 22, 1959; that on that day she turned over to the officers an eyedropper and a hypodermic needle which evidence a trace of narcotics (Exhibit "A" at the trial); that at noon on April 23, 1959, she was furnished $400 in marked currency by the law enforcement officers and about 2:30 o'clock of that day purchased a quantity of heroin from the appellant with that money; that after the purchase she remained with appellant until about 7:30 o'clock of that day, when appellant transported here in his car to the Idle Hour Cafe where both were arrested. She further testified that just prior to the departure for the Idle Hour Cafe appellant stated to her, 'You don't want to be out there with that stuff on you.' The heroin which Hazel Geary claimed to have purchased from appellant on that day was turned over to the officers after her arrest (Exhibit "B" at the trial)."

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[2] She was characterized as follows by the Court of Appeals (App. A., p. 4a, *infra*.):

> "While it is true that Hazel Geary admitted that she was a prostitute, a narcotics addict, had been convicted of a felony, to wit: grand theft, was a government informer on appellant and was under a pending indictment for the offense of passing travelers' checks knowing the same to have been forged, and on which charge she had not been tried at the time of appellant's trial in September of 1962, nevertheless, it is apparent from the verdict of the jury that it believed her testimony rather than the testimony of the appellant who denied all knowledge or connection with the narcotics transaction of which he was accused."

There was also testimony by law enforcement officers that they had petitioner under observation during the afternoon of April 23, but none saw petitioner in possession of any narcotics or transferring narcotics to Hazel Geary. When petitioner was arrested a search of his person and of his automobile disclosed neither narcotics nor marked currency. Petitioner testified in his own behalf and denied any possession of or any transaction in narcotics. He also presented evidence to show that he could not have placed the marked money in his automobile because it would have been found in the first search if it was there, and because he had been under arrest until after the search which did uncover the money.

The prosecution introduced into evidence two additional exhibits, the admissibility of which is the issue here. This evidence consisted of a bottle which had petitioner's fingerprint on it and contained milk sugar, a substance used to dilute heroin, (Exhibit "C")[3] and the marked currency which the government had given to Hazel Geary to purchase heroin (Exhibit "E").

The Court of Appeals described the circumstances by which the glass bottle was seized as follows (App. A. pp. 4-5, *infra*):

> "The record shows that the appellant came from Anchorage to Fairbanks, Alaska, on the 18th day of April, 1959, to engage in the cardroom business with one Arthur Bell. From his arrival until his

[3] The government also introduced an eyedropper and hypodermic needle containing traces of heroin (Exhibit "D") which had been seized in the same search which turned up the bottle. Exhibit "D" was originally admitted but was subsequently excluded because the trial judge ruled that there was insufficient proof of connection between the defendant and the exhibit.

arrest he was a guest in a two-bedroom one-bathroom dwelling house located in Fairbanks, rented and partially occupied by one Dolores Jean Wright, hereinafter called Wright; that following the arrest of appellant and Hazel Geary at the Idle Hour Cafe in the early evening of April 23, 1959, Wright was arrested, accused of illegal possession of narcotics and taken to police headquarters. Two law enforcement officers testified that following the arrest of Wright they requested her permission to search her apartment; that Wright said 'Yes,' that she had nothing to hide, although when presented a written waiver of search she refused to sign it, saying, 'You don't need that, you got my permission.' The officers further testified that, based solely on the verbal permission, a search of Wright's apartment was made. As a result of the search they obtained items consisting of a glass bottle containing material identified as milk sugar (Exhibit "C"), and an eyedropper and hypodermic needle ("Exhibit "D"), all of which items were taken from the bathroom of the apartment; that when the search was made no one was in the apartment and the searching officers were unaware that appellant was staying there as a guest."

With respect to the marked currency the Court of Appeals said (App. 6a):

"Following the arrest of appellant on the evening of April 23rd, his automobile was impounded by the arresting officers. On April 30, 1959, the officers received information from an undisclosed source that the marked money was secreted in appellant's automobile. The automobile was still impounded, and the officers searched it and found the marked currency secreted in the headlight section of the automobile. They did not obtain a search warrant and did not have the appellant's permission to make the search."

C. Proceedings in the District Court

Before trial petitioner made a motion to suppress any evidence found as a result of the search of petitioner's automobile. A pre-trial hearing was held on the motion (Tr. 4-13) and the motion was denied (Tr. 13). When the money found in the car was introduced (Ex. "E") petitioner reiterated his objection (Tr. 245). In the course of the trial, when the Government prepared to introduce Exhibits "C" and "D", which had been obtained in the search of the house, petitioner objected to their admission. After a hearing outside the presence of the jury (Tr. 86-121) to ascertain how the Government obtained possession of these items, the Court overruled the objection (Tr. 128-129) and admitted the exhibits into evidence. Subsequently, however, the Court excluded Exhibit "D" from the jury's consideration (Tr. 326-327). In its post-trial memorandum the District Court reaffirmed its ruling admitting Exhibit "C" (App. C., pp. 36a-39a). The Court's grounds for admitting Exhibit "E" are not stated anywhere in the record.

After trial the jury returned a verdict of guilty on a possession charge but was unable to agree on the charge that petitioner had sold narcotics to Hazel Geary. (See p. 54 of Volume I of the record in this Court). Petitioner moved for a judgment of acquittal and for a new trial which was denied by the District Court (id. pp. 83-84) with a memorandum opinion App. C., pp. 36a-44a, *infra*). Subsequently the District Court sentenced petitioner to five years imprisonment (Volume I of the record in this Court, p. 104).

D. Proceedings in the Court of Appeals

Petitioner appealed his conviction to the Court of Appeals, urging *inter alia,* that the District Court had erred in admitting Exhibits "C" and "E". The case

was heard before Judges Madden (of the Court of Claims, retired), Chambers and Jertberg. On the original hearing the Court of Appeals reversed petitioner's conviction. In an opinion by Judge Jertberg the Court ruled that Dolores Jean Wright's consent to the search of the apartment which petitioner shared with her was voluntary, but that it did not justify the seizure of the bottle. The Court also ruled that the warrantless search of the automobile was proper, and rejected his other contentions. (App. B, pp. 14a-30a *infra*).. Judge Madden dissented because in his view the bottle was lawfully obtained by the police. (App. B., pp. 30a-35a, *infra*.)

The United States petitioned for rehearing *en banc*. Under Rule 23(5) of the Court below, petitions for rehearing *en banc* are considered by the panel which heard the case and that panel decided to rehear the case itself. On rehearing a majority of the Court affirmed petitioner's conviction in an opinion by Judge Madden. Judge Chambers gave a brief concurring statement explaining the reasons for his change of position and Judge Jertberg filed a brief dissent reaffirming his views on the original hearing. (App. A, pp. 1a-12a, *infra*).

REASONS FOR GRANTING THE WRIT

I. THE SEARCH OF PETITIONER'S AUTOMOBILE AND THE CONSEQUENT SEIZURE OF THE MARKED MONEY WERE ILLEGAL.

The second search of petitioner's automobile, which uncovered the marked money which was government Exhibit "E" at his trial, was conducted without a search warrant, while petitioner was in custody, seven days after his arrest and at a location two removes from the place of the arrest. *Preston* v.

United States, 376 U.S. 364 squarely holds that a search and seizure so remote in time and place from the arrest cannot be justified under the "incident to an arrest" exception to the Fourth Amendment's mandate that a search warrant be obtained. In *Preston* the search occurred the same day as the arrest and at a police garage where it had been taken from a police station. See *id.* at 365. This Court unanimously held the search to be illegal: "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Id.* at 367. This case is identical to *Preston* in all respects but one: here the time between the arrest and search was considerably longer than in *Preston.* Reversal would follow automatically, were it not for the Government's contention that the search was reasonable because the car had been impounded for forfeiture pursuant to 49 U.S.C. § 782. Discussion of this point is required because the Government's view was adopted, without elaboration, by the Court of Appeals.[4] But as we show hereinafter this issue has likewise been decided against the Government in *Preston.*

The Governments' theory is simplicity itself: 1) 49 U.S.C. § 781 forbids the use of any vehicle for the sale or possession of certain contraband articles, including illegal narcotic drugs; § 782 in turn subjects to forfeiture any vehicle which has been used in violation of § 781. 2) The Government had probable cause to be-

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[4] The discussion of this issue in the Court's opinion on rehearing repeated that of the original majority *in haec verba,* except that the later opinion omitted the following: "It is only unreasonable searches that are prohibited. *United States* v. *Rabinowitz,* 339 U.S. 56". (App. B, p. 28a, *infra.* Compare App. A, p. 11a, *infra.*)

lieve that petitioner's car was so used and impounded it. 3) Since the car was in the lawful custody of the Government it could be searched at will, free of the requirements of a search warrant.

While there are several defects in this reasoning, the decisive one is that the same argument has already been presented to and rejected by this Court. In *Preston* itself the Government argued that independent of the arrests the search and seizure of the automobile were lawful because the officers had probable cause to believe that it had been stolen.[5] In support of that proposition the Government advanced an argument, set out in full in the margin,[6] which precisely parallels its reasoning here: 1) The officers had probable cause to believe that the automobile had been stolen. 2) As stolen the automobile was subject to seizure by the Government under the common law (*Boyd* v. *United States,* 116 U.S. 616). 3) "Once the automobile was properly seized as stolen property, it could be moved, inventoried and searched." This Court's response was

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[5] Brief for the United States, No. 163, Oct. Term, 1963, pp. 36-39.

[6] "It is not necessary, however, to go so far as *Carroll* [v. *United States,* 267 U.S. 132] went in order to sustain the searches in this case. We have seen (pp. 29-34) that the officers had probable cause to believe that the automobile had been stolen. They had reasonable ground to believe that they could seize it as stolen from its proper owner; there was no need to search an automobile which was not itself contraband while looking for contraband. As this Court stated in *Boyd* v. *United States,* 116 U.S. 616, 623, "[t]he seizure of stolen goods is authorized by the common law." The reason is that the thieves have no right to such goods since "the owner from whom they were stolen is entitled to their possession * * *." *Id.* at 624. Once the automobile was properly seized as stolen property, it could be moved, inventoried, and searched." Brief for the United States, No. 163, Oct. Term, 1963 p. 39, footnote omitted.

brief but unequivocal: "Here, we may assume, as the Government urges, that, either because the arrests were valid, *or because the police had probable cause to think the car stolen,* the police had the right to search the car when they first came on the scene. But this does not decide the question of the reasonableness of a search at a later time and at another place." 376 U.S. at 367-68. (Emphasis supplied). Except that the Government's claim to possession rests on a different source than in *Preston,* a difference that cannot be thought to affect the result, the *Preston* case is this case.[7] The judgment below should not be permitted to stand.

II. THE SEARCH OF WRIGHT'S APARTMENT AND THE SEIZURE OF THE GLASS BOTTLE WERE ILLEGAL

A. The Court of Appeals' Reliance on Miss Wright's "Consent" Is Contrary to the Decisions of This Court

Since the police admittedly had no warrant either to search Miss Wright's apartment or to seize the glass bottle which became Exhibit C at petitioner's trial, its admissibility depends, as all agree, on the effectiveness of Miss Wright's "consent" to the search of her apartment to validate that search and the subsequent seizure of the bottle. On the original hearing a majority of the Court below held that the bottle was inadmissible. The Court determined that petitioner had standing to object to the admission of the bottle (App. B., pp. 21a-26a, relying particularly on *Jones* v. *United States,* 362 U.S. 257) and held that Miss Wright's consent,

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[7] If anything, the Government's present case is somewhat weaker. In *Preston* the Government said: "There was no need to search an automobile which was not itself contraband while looking for contraband." See n. 6, *supra.* This step of its reasoning would seemingly be unavailable here, for the automobile is only "derivative" contraband, whereas it was contraband *per se* in *Preston.* Cf. *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693.

even if binding on her, did not make the search "reasonable" under the Fourth Amendment, and the evidence seized admissible against petitioner, her house guest. The Court pointed to *United States* v. *Jeffers*, 342 U.S. 48 and *Chapman* v. *United States*, 365 U.S. 610 and concluded that a house guest was entitled to the same protection as a hotel guest or a tenant.[8] (App. B, pp. 26-28, *infra*.)

On rehearing, the majority below reached the opposite result. Judge Madden acknowledged petitioner's standing to object (App. A, p. 10, *infra*) but held that the search and seizure were lawful. He reasoned as follows:

> "If a tenant of a two-bedroom, one-bathroom apartment rents one of her bedrooms to another person, and if the narcotics squad picks up a narcotics victim and asks him where he got the narcotics, and he says he got them in that apartment, and the officers go to the apartment and tell the tenant what they have heard and she indignantly denies the possibility of such an occurrence and the officers ask if they may look through the apartment and she says they may but they will not find anything, and they do look and they find narcotics in the bathroom, may they not seize them? Does the Constitution say that this lady may lawfully consent to the entrance into her bathroom of any person in the whole wide world except officers of the government whose duty it is to enforce that government's laws? Does it say that the officers, having entered and seen objects whose only use is to violate the laws, have somehow blundered, so that the conclusive evidence which they have thus discov-

[8] The Court could also have cited *Stoner* v. *California*, 376 U.S. 483 decided two months previously.

ered cannot thereafter be used by their government to convict the guilty person?"

> "The Constitution forbids 'unreasonable searches.' We see nothing unreasonable in the search, in the instant case, of Wright's bathroom, with her consent." (App. A, pp. 9-10, *infra.*)

We note, without stopping to consider its possible legal implications, a difference between the case hypothesized by Judge Madden (seizure of narcotics, which are contraband) and the facts here (seizure of a glass bottle containing a substance which can be used to dilute narcotics). And we acknowledge that this reasoning has a substantial surface appeal. But we submit, with all respect, that it cannot be squared with the decisions of this Court which have established the test for determining whether the consent of one person can support the admissibility of seized evidence against another. While we agree that the *Jeffers* and *Chapman* cases, *supra,* (cited in the original opinion but not discussed on rehearing) lead to the same result, we think the most important authority is *Stoner* v. *California,* 376 U.S. 463. There the Court (unanimous on this issue) held that the test was whether the consenting person was acting as the *agent* of the defendant.

> "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent." *Id.* at 489.

By that test, Wright's consent was plainly not binding on petitioner. There is no suggestion in the record that they were partners in a narcotics enterprise, cf.

United States v. *Sferas*, 210 F. 2d 69 (CA 7), or that there is any other basis for inferring that Wright was acting in petitioner's behalf. On the contrary, it is entirely clear that Wright was acting strictly in her own behalf, to exculpate herself from the charges on which she had been arrested.[9] This is expressly stated by Judge Madden in the passage quoted above, and in two other places in his opinion (App. A, pp. 5a and 8a, *infra.*) While we do not assert that common-law rules are strictly applicable for determining agency in applying the *Stoner* test, the facts here emphatically negative an agency relationship under any plausible meaning of "agent."[10] The point which Judge Madden's analysis appears not to have taken into account—but which was the premise underlying this Court's decisions in *Jeffers, Jones, Chapman* and *Stoner*—is that the constitutional right of privacy is personal to each individual whose persons, papers and effects the Government wishes to search or seize. That is why the only consent which can sanction invasion of an individual's privacy is his own, or that of his agent. And the same point leads to an additional line of reasoning which requires disapproval of the result reached below. Even if it be assumed (for this purpose only) that the police were properly looking around the apartment in the privacy of which Wright and petitioner each had an

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[9] This fact supports, though not conclusively, the Government's position that consent was voluntary. See n. 17, *infra.*

[10] Indeed one can go one step further. Wright was acting directly counter to petitioner's interest. "It is crystal clear that the purpose of the search of the apartment was to seize incriminating evidence against the appellant." App. B, p. 21a, *infra.* This observation in the Court's original opinion was not contradicted in Judge Madden's dissent or in his subsequent opinion for the Court.

interest, it by no means follows that the police could seize any objects they found and introduce them into evidence against him. If, for example, the police had found some personal letters belonging to petitioner, would Wright's consent even arguably have authorized their seizure? Whatever its effect on the legality of the *search,* Wright's consent cannot support the *seizure* of *petitioner's* effects. This difficulty seems to have escaped attention below because of the ambiguity of petitioner's interest in the bottle. The seizure can be sustained only on the assumption that petitioner had no interest in the bottle;[11] but on that assumption it should have been excluded as irrelevant and immaterial.[12] Thus, to sustain the admissibility of Exhibit C "would be to permit the Government to have the advantage of contradictory positions as a basis for

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[11] That interest need not be a possessory interest, cf. *Jones* v. *United States,* 362 U.S. 257, 263.

[12] This inherent inconsistency is highlighted by the Court of Appeals' opinion. The bottle was thought to be of little evidentiary importance, because the petitioner "might well have picked up numerous articles in the bathroom and there left his fingerprints on them, quite innocently . . ." (App. A, p. 8a, *infra*). It is readily understandable that having started with this view, the Court failed to consider petitioner's interest in saving the bottle from seizure apart from his interest in the privacy of the apartment generally. But the very statement of the attenuated relationship between petitioner and the bottle, far from confirming admissibility, establishes that the jury should not have been allowed to consider the bottle as evidence against him. It should be noted too that the District Court assessed Exhibit C differently, for it was allowed to remain in evidence though Exhibit D (secured in the same search) was removed from the jury's consideration because it was insufficiently linked to the defendant. See App. A, p. 6a, *infra.* Indeed, the jury might have inferred significance from the very fact that it had been admitted. As the closing statements were not transcribed we do not know how much reliance the prosecution placed on this evidence before the jury.

conviction," contrary to the teachings of *Jones* v. *United States,* 362 U.S. 257, 263.

The importance of the question was well stated by the Government in its Petition for Rehearing *en banc* below.

> "The Court's previous decision is not an insignificant one which pertains only to this case. It will affect nation-wide law enforcement and is of such general importance as to merit review by the entire Court." (Id. p. 2).

A case which, in the view of the United States, "will affect nation-wide law enforcement" plainly warrants the attention of this Court.

B. Miss Wright's Consent Was Not Voluntary

In our previous discussion we have accepted the premise of the courts below that Wright's consent to the search of the apartment in which petitioner was her guest was voluntary. But that assumption itself raises two questions on which the Courts of Appeals are divided, and which are of considerable importance to the administration of criminal justice. The first, and subsidiary question is the scope of review to be applied by the Courts of Appeals in passing on a determination by the trial court that a consent to a search was voluntary. The second is whether and under what circumstances a consent by a person under arrest can be voluntary as a matter of law.

(1) In approving the trial court's determination that Wright's consent was voluntary the Court of Appeals applied the "clearly erroneous" standard which had been adopted for the Ninth Circuit in *U.S.* v. *Page,* 302 F.2d 81 (en banc). (App. A, p. 8a) This view is

contrary to that of the Seventh and District of Columbia Circuits, *United States* v. *MacLeod*, 207 F.2d 853 (CA 7); *United States* v. *Arrington*, 215 F.2d 630 (CA 7); *Judd* v. *United States*, 190 F.2d 649 (CADC); *Higgins* v. *United States*, 209 F.2d 819 (CADC). The Government, citing those cases with apparent approval, has recognized that they require a broader review than the clearly erroneous standard which the Ninth Circuit subsequently adopted.[13] The question whether a consent to a search is voluntary for the purpose of determining whether it justifies a search which would otherwise be illegal under the Fourth Amendment is obviously a question having legal, indeed, constitutional elements. Accordingly, the "clearly erroneous" standard applied below affords inadequate review. Petitioner was entitled to have at least one proper appellate review of the district court's finding of vol-

[13] Brief for the United States in Opposition, *Ziemer* v. *U.S.*, No. 227, Oct. Term, 1961, pp. 6-7. In *Ziemer* the petitioner had argued that the Courts of Appeals are split on whether the test of appellate review is that the finding of the District Court is sufficiently supported by substantial evidence or that the finding can be sustained only when the appellate court determines on independent appellate review that the evidence shows bona fide consent to the search. The Government stated that there is no difference between these two tests:

> "In each case, the appellate court defers to the district court on matters of credibility and reviews the sufficiency of the evidence in support of the determination that consent to search had been obtained. Whether the court, in reviewing the credible evidence, finds sufficient support for the consent to search is the central issue on appellate review. *Channel* [v. *United States*], 285 F. 2d [217] at 220; *Judd, supra*, 190 F. 2d at 652; *MacLeod, supra*, 207 F. 2d at 854." Id. at p. 7. Certiorari was denied in *Ziemer*. 368 U.S. 877.

In this case the Court of Appeals plainly failed to "review the sufficiency of the evidence in support of" the Trial Court's determination.

untariness.[14] Accordingly, the case should be remanded to the Court of Appeals for re-examination of the voluntariness of the consent under proper standards or the issue should be determined by this Court.[15] We submit that the latter course would be preferable for the issue of voluntariness itself warrants this Court's consideration, as we now show.

(2) This Court has not decided whether a consent to a search given by a person under arrest can ever be considered voluntary to justify a search without a warrant or, if so, how the voluntariness of a consent given under arrest is to be determined. The issue is one which recurs continually and is one on which the lower federal courts and the state courts (which will be confronted with the same issue, *Ker* v. *California,* 374 U.S. 23) should have the guidance of this Court. We think there is much to be said for a rule holding that consent to a search given under arrest is never voluntary. Coercion or moral compulsion is implicit in arrest. On the other hand, a square holding that officers cannot rely on the consent given by a person under arrest would not inhibit the operations of the police because when the person whose premises are to be searched is in custody there will rarely be any reason not to obtain a search warrant. Indeed, the police will be benefited by a flat rule because they will know that they cannot rely on the consent and will therefore not be tempted to search without a warrant

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[14] We do not challenge the appropriateness of the Court's acceptance of the trial court's evidentiary findings on this issue, i.e., its refusal to credit Miss Wright's denial that she had consented.

[15] Compare *McAllister* v. *U.S.*, 348 U.S. 19. There the Court after determining the proper scope of review of findings of a district court sitting without a jury in an admiralty case went on to apply that test itself rather than remand to the Court of Appeals.

and to take the risk that the search will subsequently be held to be illegal. Moreover, a general rule which accords with general human experience would remove from the trial courts the necessity of making difficult ex post facto judgments on the state of mind of the consenting party. Particularly if such a rule were to be applied prospectively, cf. *Linkletter* v. *Walker,* 381 U.S. , 33 LW 4576 (June 7, 1965) it would have a salutary effect on the administration of criminal justice.

It does not appear appropriate to explore in a petition for certiorari the factors which are to be considered in passing on the voluntariness of consent during arrest in the absence of a general rule vitiating such consents. To some extent of course each case would then have to depend on its own facts, and the process of decision could not depend on a "mere color matching of cases," as this Court observed in the analogous context of the voluntariness of a confession.[16] But even as, in the confession cases, this Court has delineated certain elements to be considered in determining voluntariness (e.g. the age of the party, and the circumstances of the arrest) so it should be possible to isolate the factors which strongly point to or against voluntariness. If the fact of arrest is not controlling the question is admittedly a close one in this case.[17] At bottom the question is a constitutional

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[16] *Reck* v. *Pate,* 367 U.S. 433, 442.

[17] Miss Wright's attempt to exculpate herself appears to be the strongest point in the Government's favor. But whether it is sufficient to carry the Government's burden of proof on this issue (see *U.S.* v. *Page,* 302 F. 2d 81, CA 9 and cases cited id. at 83, n. 1) is another matter. Miss Wright was arrested at night, apparently without a warrant, taken to the police station and her consent solicited by the police. Perhaps this Court will also consider relevant other factors which were not developed at the hearing.

one because it concerns the waiver of a constitutional right. The rules to determine when such a waiver is effective can be promulgated only by this Court. The question arises with such frequency that an early resolution would be of great value to the public, the police and the lower courts.

CONCLUSION

By reason of the foregoing this Petition for Certiorari should be granted.

Respectfully submitted,

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